STATE OF MICHIGAN

COURT OF APPEALS

JULIE M. KENNEY, Plaintiff-Appellee,	UNPUBLISHED June 18, 2009
v	No. 278090 WCAC
ALTICOR, INC., Defendant-Appellant.	LC No. 04-000409

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

This matter returns to this Court on remand from our Supreme Court for our consideration as on leave granted and with the direction that we evaluate the merits of this appeal in light of *Stokes v Chrysler, LLC*, 481 Mich 266; 750 NW2d 129 (2008). *Kenney v Alticor, Inc*, 482 Mich 1008; 761 NW2d 84 (2008). Defendant challenges a determination of the Worker's Compensation Appellate Commission ("WCAC") that plaintiff established a compensable work-related disability as defined in MCL 418.301(1) and *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). We remand for further proceedings.

Section 301(1) of the Worker's Disability Compensation Act (WDCA) provides that "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." MCL 418.301(1). The WDCA defines the term "disability" as "a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease." MCL 418.301(4). In *Sington*, *supra* at 156-157, our Supreme Court ruled that a condition that renders an employee unable to perform a job paying the maximum salary, given the employee's qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training, does not constitute a disability. Only when the employee is no longer able to perform any of the jobs that pay the maximum wages, given the employee's training and qualifications, is a disability established under § 301(4). *Id*. at 157. Accordingly, "the language of § 301(4) requires a determination of overall, or in other words, maximum, wage earning capacity in all jobs suitable to an injured employee's qualifications and training." *Id*. at 159.

More recently, in *Stokes*, *supra* at 281, our Supreme Court delineated the proofs necessary to establish a prima facie case of disability under *Sington*. A claimant may not establish a prima facie case of disability by merely demonstrating that "his work-related injury

prevents him from performing a previous job." *Id*. Rather, the claimant must show a work-related injury and that that injury resulted in a reduction of the claimant's wage-earning capacity in work suitable to his qualifications and training. *Id*. To establish the requisite reduction in wage-earning capacity, the claimant must satisfy the following "four steps." *Id*. at 281-283. First, the claimant must fully disclose his qualifications and training. *Id*. at 281-282. Second, the claimant must establish what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. *Id*. at 282. Third, the claimant must prove that his work-related injury "prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages." *Id*. at 283. Fourth, the claimant must show that he cannot obtain any of the jobs he is capable of performing. *Id*.

Here, the WCAC found that plaintiff's testimony that she would not have refused any job offered to her because she was desperate for a job and that she was unable to find an employer willing to hire her for any job was sufficient to establish that she was unable to perform all the jobs within her wage-earning capacity that pay any rate, let alone that pay at the maximum rate. This finding by the WCAC reflects a misapplication of the substantial evidence standard and of the principles governing the establishment of a prima facie case of disability, as delineated in *Sington* and *Stokes*. *Schmaltz v Troy Metal Concepts, Inc*, 469 Mich 467, 471; 673 NW2d 95 (2003).

The magistrate correctly determined in the first instance that plaintiff presented insufficient proofs to establish that she suffered from a compensable disability as defined in *Sington*. With respect to the second of the "steps" required by *Stokes*, for example, plaintiff presented no proofs showing what jobs, if any, she is qualified and trained to perform within the same salary range as her maximum earning capacity at the time of the injury. As noted in *Stokes*, "the claimant must provide some reasonable means to assess employment opportunities to which [her] qualifications and training might translate[,]" for example, "the job listings for which the claimant could realistically apply given [her] qualifications and training[.]" *Stokes, supra* at 282. Although the appellate courts of this state have observed that a claimant's testimony alone is sufficient to support a finding of disability, see, e.g., *Sanford v Ryerson & Haynes, Inc*, 396 Mich 630, 637; 242 NW2d 393 (1976); *Woods v Sears, Roebuck & Co*, 135 Mich App 500, 504; 353 NW2d 894 (1984); *Black v Gen Motors Corp*, 125 Mich App 469, 474; 336 NW2d 28 (1983), and although *Stokes* acknowledged that a claimant can establish what jobs, if any, the claimant is qualified and trained to perform within the same salary range as his or her maximum earning capacity without expert testimony and through the claimant's own testimony, *Stokes, supra* at 282, the claimant is still required to present an objective means to assess employment opportunities, such as job listings from a newspaper, a job-placement agency, or a career counselor. *Id*.

Similarly, plaintiff's generalized and conclusory testimony regarding her inability to find an employer willing to hire her for any job simply lacks sufficient detail to allow a proper and thorough disability analysis under the stringent requirements detailed in *Stokes*. A claimant must demonstrate a connection or linkage between a wage loss and a work-related injury to be entitled to disability benefits. *Harvey v Gen Motors Corp*, 482 Mich 1044; 757 NW2d 178 (2008); *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 8-9; 760 NW2d 586 (2008).

Given the proof requirements explained by the Supreme Court in *Stokes*, we remand this matter to the Board of Magistrates for a new evidentiary hearing and decision on the issue of disability, using the four-factor test set out in *Stokes, supra* at 270, 299. See *Innes v Allied Automobile Group, Inc*, 482 Mich 970; 755 NW2d 167 (2008). As the Supreme Court did in *Innes*, we direct that "plaintiff's current entitlement to benefits shall continue until a new decision is issued by the Board [of Magistrates]." *Innes, supra*.

We do not address the other issues raised by defendant as they are not properly before us. The Supreme Court's order remanding this case to us was limited to the proper application of *Stokes* and leave to appeal all other issues raised by defendant was previously denied by our Court. Accordingly, on remand, the magistrate shall only consider whether plaintiff can satisfy the *Stokes* burden of proof regarding the compensable injury question, as discussed above. The other issues raised by defendant as to which we previously denied leave are not to be reconsidered on remand.

We remand to the magistrate for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro